A **SAMSUNG ELECTRONICS DISPLAY (M) SDN BHD & ANOR**

v.

REELIANCE SECURITY SERVICES SDN BHD

B HIGH COURT MALAYA, SHAH ALAM
SURAYA OTHMAN J
[SUIT NO: 22-1637-2009]
1 OCTOBER 2013

C ***TORT:*** *Negligence - Security guard - Security services agreement - Theft - Whether security services extended to cover another storage yard - Whether voluntary placement of security guard at storage yard amended agreement to include 'new premise' - Whether security protocols validly provided pursuant to agreement - Whether details of stolen goods provided - Whether security company liable for losses suffered*

D ***INSURANCE:*** *Theft insurance - Construction of policy - Subrogation - Whether security services agreement and insurance policy covered two storage yards - Whether insurer could recover sum from security service provider*

E The first plaintiff, Samsung Electronics Display (M) Sdn Bhd ('Samsung') was insured by the second plaintiff, AXA Affin General Insurance Bhd ('AXA-Affin'). The defendant ('Reeliance Security') was appointed to provide security services at Samsung's premises as provided in the security services agreement ('SSA') dated 9 May 2006. On 3 August 2006 at Konsortium Logistik Bhd ('KLB') container
F storage yard at Senawang, the defendant's security guard allowed a Samsung's employee to take out a container filled with 32 pallets stc 704 units of plasma display panel modules from the premises without Samsung's consent. Due to this, 16 pallets stc 352 units plasma display panel modules were stolen. The plaintiffs submitted that the theft was
G caused solely by the negligence of Reeliance Security in not providing proper security. AXA-Affin paid a compensation of RM707,138.57 to Samsung under the insurance policy for the alleged theft and was now claiming for the same under the principle of subrogation. The plaintiffs' case was that the premises referred to in the SSA was Lot PT 12692,
H Mukim Ampangan, Tuanku Jaafar Industrial Park, Seremban ('Seremban') and also extended to cover Senawang because Reeliance Security had posted one security guard at the entrance of the Senawang storage yard which Samsung rented from KLB. In defence, Reeliance Security contended that it had entered into the SSA with Samsung to
I provide security services at Samsung's premises in Seremban only and had never contracted to provide any security services at Senawang. The issues that arose for determination, *inter alia*, were (i) whether Reeliance Security contracted to provide security services at Senawang; (ii) whether

Reeliance Security was negligent in not complying with the security requirements or protocols issued by Samsung; (iii) whether as a result of the negligence, the theft of 352 units of plasma display panel modules had been proved by the plaintiff; (iv) whether the plaintiffs had discharged the burden of proving its case by calling all relevant witnesses; and (v) whether AXA-Affin could recover the sum of RM688,672.507 and fee of RM18,466.50 under the principal of subrogation from Reeliance Security.

Held (dismissing plaintiffs' claim with costs):

(1) A mere conduct of Reeliance Security in fulfilling Samsung's verbal request to post a guard at the entrance of the KLB container storage yard at Senawang could not be considered as common intention to amend the clause in the SSA to include the 'new premises'. Since the SSA and the insurance policy did not cover Senawang, Reeliance Security was not liable for breach of contract to provide security services at Senawang. Even if the storage container yard was covered by the SSA, the issue of negligence on the part of Reeliance Security did not arise and was a non-issue since Samsung could not prove that it had given any written directives to Reliance Security under the SSA. (paras 30 & 31)

(2) The full report, the method of investigation, as well as the steps taken in coming to PW1's findings was not made available in the court. It was unusual for the 'suspects of the alleged theft' to not be interviewed by the adjuster. The plaintiffs did not give any explanation why the two employees who were still in employment were not questioned or interviewed. Further, the Vice President of AXA-Affin admitted that there was no evidence to prove the original contents of the container and the quantity of goods in the container. Therefore, the plaintiffs had failed to show any evidence that there was a theft of 352 units of plasma display panel modules. As such, the plaintiffs' claim for losses suffered was not established. (paras 33 & 34)

(3) The plaintiffs had failed to adduce evidence from two witnesses, *ie*, the Security Manager and the Head of the Material Control Department to prove the actual contents of the said container. During cross-examination, it was revealed that the actual department that could prove this fact would be the Material Control Department. However, the head of the department was not called and neither were any personnel, officers or representatives of the Material Control Department were brought to court to testify as to the actual contents of the container. Thus, there was no evidence presented that there was a theft and what actually was stolen from

A the said container. Further, the failure or refusal to adduce these witnesses and documents would raise an adverse inference against the plaintiffs under s. 114(g) of the Evidence Act 1950. (paras 35 & 37)

B **(4)** The plaintiffs failed to prove negligence and liability of Reeliance Security. As such, Reeliance Security was not liable to pay RM707,138.57 for the money paid by AXA-Affin to Samsung as insured money based on the insurance policy. The plaintiffs had failed to satisfy its obligation to prove its case on the balance of probabilities. (para 36)

C **Case(s) referred to:**

Bandar Raya Developments Berhad v. Ang Yoke Lin Construction Sdn Bhd [1993] 2 CLJ 53 HC ***(foll)***

CIMB Bank Bhd v. Ng Lee Lian & Anor and Another Case [2011] 10 CLJ 116 HC ***(refd)***

D *Jagathesan v. Linggi Plantations Ltd [1967] 1 LNS 61 FC* ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Selvaduray v. Chinniah [1939] 1 LNS 107 HC ***(refd)***

Tenaga Nasional Berhad v. Perwaja Steel Sdn Bhd [1995] 4 CLJ 670 HC ***(foll)***

E **Legislation referred to:**

Evidence Act 1950, s. 114(g)

For the plaintiffs - Ganesarajah Nadarajah; M/s Sarbjit Ganes
For the defendant - Mahendra Mahason; M/s Ravi Rajan & Assocs

F *Reported by Sandra Gabriel*

JUDGMENT

Suraya Othman J:

G

Introduction

[1] In this action, the second plaintiff Axa-Affin General ("Axa-Affin") is the insurer of the first plaintiff, Samsung Electronics Display (M) Sdn Bhd ("Samsung"). Reeliance Security Services Sdn Bhd, the
H defendant ("Reeliance Security") is a security company providing security services for Samsung's premises. The plaintiffs' claim that on 3 August 2006 at around 9.30pm, a Reeliance's security guard allowed a Samsung's employee to take out a container filled with 32 pallets stc 704 units of plasma display panel modules from
I Samsung's premises without Samsung's consent and due to this 16 pallets stc 352 units plasma display panel modules were stolen. Axa-Affin, Samsung's insurer paid compensation of RM688,672.07 and

RM18,466.50 as fees, a total of RM707,138.57 to Samsung under the insurance policy for the alleged theft and is now claiming for the same under the principle of subrogation. Thus the plaintiffs claim against the defendant is for breach of security services agreement dated 9 May 2006.

Facts And Background

[2] The first plaintiff (Samsung), is a limited company, incorporated under the Companies Act 1965 and has its address at No. HSD 69224, Lot PT12692, Mukim Ampangan, Tuanku Jaafar Industrial Park, 71450 Seremban, Negeri Sembilan.

[3] The second plaintiff (Axa-Affin), an insurance company, is a limited company incorporated under the Companies Act 1965 and has its address at Wisma Boustead, 71, Jalan Raja Chulan, 50200 Kuala Lumpur. Axa-Affin issued a policy insurance no. S2DACF 240160600 to Samsung.

[4] The defendant (Reeliance Security), a security company is a limited company under the Companies Act 1965 and has its address at No. 63-3, PJ Highway Centre, Jalan 217, Section 51 Petaling Jaya, Selangor or at No. 33 Jalan Indrahana 2, Taman Indrahana, Jalan Kuchai Lama, 58100 Kuala Lumpur.

[5] The plaintiffs claim against the defendant is based on the security services agreement dated 9 May 2006, ("the said agreement"), wherein the defendant ("Reeliance Security") was appointed to provide security guards and security for the valuables at Samsung's premises. It is the plaintiffs' case that the premises referred to in the agreement include Lot PT 12692, Mukim Ampangan, Tuanku Jaafar Industrial Park, 71450 Seremban, Negeri Sembilan and at the Konsortium Logistik Bhd (KLB) container storage yard at Senawang, 71450 Seremban, Negeri Sembilan which Samsung rented from KLB.

[6] The plaintiffs pleaded that on 3 August 2006, at around 9.30 at night, Reeliance Security's security guard, Krishnan Veeran had negligently allowed a container bearing no. HJCU 1187178 to be taken out of the premises without a gate pass, that is, without Samsung's consent. The container was laden with 32 pallets stc 704 units of plasma display panel modules with a seal no. H-907396. Due to the negligence of Reeliance security guard, 16 pallets stc 352 units of plasma display panel modules were stolen. The plaintiffs submitted that the theft was caused solely by the negligence of Reeliance security guard in not providing proper security.

[7] Reeliance Security in its defence stated that it had entered into a security service agreement dated 9 May 2006 with Samsung to provide security services at Samsung's premises identified as Lot 12692, Mukim Ampangan, Tuanku Jaafar Industrial Park, 71450 Seremban, Negeri Sembilan. Reliance Security further pleaded that it had never contracted to provide any security services at the place where the alleged theft had occurred on 3 August 2006, that is, at the KLB container storage yard at Senawang, 71450 Seremban, Negeri Sembilan ("KLB container storage yard").

[8] It is also pleaded by Reeliance Security that there is no standard operating procedure established or made known by Samsung to Reeliance Security. Reeliance Security also further disclosed that on the date of the alleged theft, the container bearing number HJCU 1187178 was driven out from the KLB container storage yard by prime mover no. 286 at around 9.30pm at night on the instruction of Samsung's employee, Mr Mazlan bin Mansor. After the container was taken out it was driven back to the container storage yard at around 11.30pm at night. Thus Reeliance Security submitted that if there was indeed a theft as alleged by Samsung, the said alleged theft was caused by Samsung's own negligence.

[9] In the course of this trial, the plaintiffs called three witnesses to testify while the defendant called one witness. The plaintiffs' witnesses and defendant's witness are as follows:

a) Mr. Tan Eng Hye, senior vice president of Mestari Adjuster Sdn Bhd as PW1;

b) Mr. Teh Yau Kun, vice president of Axa-Affin as PW2;

c) Puan Mareza binti Mohammad, senior human resource officer in Samsung as PW3; and

d) Mr. K Ramesh Karnan, operations manager of Reeliance Security as DW1.

Issues To Be Tried

[10] Parties agreed that the issues to be tried are:

1. Whether the theft which occurred in the KLB container storage yard on 3 August 2006 was due to the negligence on the part of Reeliance Security, its agent, representatives or employees in its failure to safeguard the said container storage yard.

2. Whether Samsung, its representatives or employees were negligent in its failure to ensure the safety of Samsung's goods and its KLB container storage yard.

3. Whether Axa-Affin, the insurer for Samsung who has paid compensation to Samsung as a result of the theft on 3 August 2006 can recover the sum of RM688,672.507 and fee of RM18,466.50 under the principal of subrogation from Reeliance Security.

Findings Of The Court

[11] It is not disputed that the Samsung and the Reeliance Security have signed a security services agreement dated 9 May 2006 (CBD pg 1 till 9), in which Reeliance Security was appointed to provide security guards and security for the valuables at Lot PT 12692, Mukim Ampangan, Tuanku Jaafar Industrial Park, 71450 Seremban, Negeri Sembilan. However, the main question to be determined here relates to whether Reeliance Security was also contracted to provide security services at the place where the alleged theft had occurred on 3 August 2006, that is, at the KLB container storage yard at Senawang, 71450 Seremban, Negeri Sembilan. Thus the main issues to be determined here are as follows:

(1) Whether Reeliance Security is liable for breach of agreement/contract to provide security services at the KLB container storage yard at Senawang, 71450, Seremban, Negeri Sembilan.

(2) If the KLB storage container yard is covered by the agreement, whether Reeliance Security is negligent in not complying with the security requirements or protocols issued by Samsung.

(3) Whether as a result of the negligence, theft of 352 units of plasma display panel modules has been proven by the plaintiffs.

(4) Whether the plaintiffs has discharged the burden of proving its case by calling all relevant witnesses and producing relevant evidence to prove the above.

[12] I have heard the evidence, read the documents, examined the exhibits and submissions of both the parties. Counsels, Mr Ganesarajah Nadarajah and Mr Mahendra Mahasan have dealt with the evidence and the law in their submissions in great detail. After having given much consideration to the submissions of learned counsels, my findings *inter alia* are as follows:

[13] The central issue falls on whether Reeliance Security is liable for breach of agreement/contract to provide security services at the KLB container storage yard, Senawang which resulted in the theft of Samsung's 352 units of plasma display panel modules. Mr Ganesarajah Nadarajah, solicitor for plaintiffs submitted that the security services agreement dated 9 May 2006 is also extended to cover the KLB container storage yard because Reeliance Security had posted one

A security guard at the entrance of the said yard. Thus, by the conduct of the Reeliance Security, it affirms the fact that the agreement also covers the KLB container storage yard. Mr Mahendra Mahason, solicitor for Reeliance Security on the other hand submitted that if one were to look at the security services agreement, it covers only Samsung's B premises at Lot PT 12692, Mukim Ampangan, Tuanku Jaafar Industrial Park with absolutely no mention of the KLB container storage yard at Senawang.

[14] In deciding on this issue, firstly, I will discuss the evidences of the witnesses and documents that were tendered into court. PW1, PW2 C and PW3 were the witnesses called by the plaintiffs.

[15] PW1, Mr Tan Eng Hye, the vice president of Mestari Adjuster Sdn Bhd gave evidence that he was unaware that the KLB container storage yard at Senawang was actually a different property, distinct D and separate from Samsung's premises as stated in the security services agreement. He was aware of the security services agreement dated 9 May 2006 but he did not verify as to whether the said agreement covers the said KLB container storage yard. Further, in cross-examination, he admitted that the premises as stated in the E agreement and the KLB container storage yard are two separate and distinct properties and that the properties belong to different owners; KLB container storage yard was owned by Konsortium Logistik Bhd (KLB) and was rented by Samsung from KLB to store its containers.

[16] PW1 also admitted, under cross-examination, that he did not F interview the two employees of Samsung, Mr Mazlan bin Mansor and Mr Shaharudin bin Yahya who according to his investigation had taken the said container out of the KLB container storage yard on 3 August 2006, the night the theft occurred. In re-examination, he stated that on the said night, Shaharudin bin Yahya was the driver of the truck while Mazlan G bin Mansor was a passenger in the truck. During cross-examination the adjuster had tried to maintain the plaintiffs' case that any container that was to be taken out of the container storage yard, had to be done so with a gate pass and a container movement chit. However despite initially being adamant that this should be the procedure, the adjuster admitted that there is no proof in this case that there were verbal H instructions from Samsung to Reeliance Security with regards to specific security protocols such as the requirement of a gate pass or a container movement chit before a container can be taken out of the storage yard.

[17] PW1 had also admitted that pursuant to cl. 10 of the security I services agreement there must be written instructions with regards to any specific security protocol and that there were no written directives given by Samsung to Reeliance Security with regards to security

protocols pertaining to the KLB container storage yard. PW1, too, admitted that there is no specimen of a gate pass or a container movement chit to actually convince this court that there are in fact such documents that are required for the movement of containers from the KLB container storage yard.

[18] The adjuster also admitted that there is no proof presented before this court to show that initially the said container was actually laden with 704 units of plasma display panel modules and that Samsung had informed Reeliance Security that the containers stored in the KLB container storage yard were actually laden containers.

[19] Axa-Affin's witness, PW2, Mr Teh Yau Kun, who is the vice president of Axa-Affin testified that the evidence he is giving in court are based on what was told to him by the adjuster, Mr Tan Eng Hye, PW1, and one Joanna Liew and not from any personal knowledge. PW2 testified that the insurance policy covering Samsung against theft only covered the address that is the premise. In this regard, the address of the KLB container storage yard is not stated in the said policy which was tendered as exh. D4. It is important to note that PW2 also agreed that the security services agreement only mentioned Samsung's premises and makes no reference to the KLB container storage yard.

[20] Apart from that PW2 agreed that from his findings, two of Samsung's employees took the container out from the KLB container storage yard and as such has committed theft and fraud on Samsung. Mr Teh Yau Kun also stated that his testimony that there was a theft of 352 units of plasma display panel modules was based on what was told to him by Samsung's officers and the adjuster, Mr Tan Eng Hye, PW1. That Reeliance Security's security guard acted without authorisation and proper procedures in allowing the said container to be taken out from the KLB container yard was also informed so to him by the adjuster's report.

[21] As regard to the plaintiffs' third witness, who is currently the senior officer of human resource and administration in Samsung, PW3, Miss Mareza Mohamad; she testified that she was not involved with the negotiation and formation of the security services agreement between Samsung and Reeliance Security. She admitted that the KLB container storage yard belonged to another company, Konsortium Logistik Bhd (KLB) and does not belong to Samsung but was rented by Samsung from KLB to store its container. Thus, SP3, cannot confirm whether the security services agreement actually covers the KLB container storage yard as the agreement only mentioned the premises at Lot PT 12692, Mukim Ampangan, Tuanku Jaafar Industrial Park.

[22] Further, she agreed that all directives by Samsung to Reeliance Security under cl. 10 of the security services agreement must be made in writing and that any verbal directives, if given by Samsung, must be superseded with written directives within a reasonable time. Pertaining to the standard operating procedures as to security matters, PW3 stated that the security officers and the security manager, Ms Wong Mook Lan, are in charge of security matters and that she is not involved in the receiving or giving of any security protocols to Reeliance Security. She also stated that Mr K H Soh who is the head of the Material Control Department is in charge of the container despatch, movement of containers and storage of containers in Samsung.

[23] Reeliance Security's only witness, DW1, Mr K Ramesh Karnan, who is the operations manager testified that it was Samsung who requested that a guard be posted at the entrance of the KLB container storage yard to keep an eye on the containers therein and he obliged. He was not informed that the containers were laden. Mr K Ramesh Karnan testified that the landlord of the KLB container storage yard is one Konsortium Logistik Bhd ("KLB") and the security services agreement does not cover the KLB container storage yard.

[24] DW1 testified that Samsung is aware that Reeliance Security is not to be blamed or is responsible for the theft which occurred which was why till to date Samsung still continued to engage Reeliance Security to provide security services at its premises. In fact according to him Samsung had renewed the agreement.

[25] Further, according to DW1, there were no standard operating procedures established by Samsung which was made known or issued to Reeliance Security in writing in respect of the security requirements as provided for in the agreement.

[26] On 3 August 2006, DW1 stated that the container bearing the number HJCU11187178 was released on demand, authorisation and instruction of Samsung's employee, Mazlan bin Mansor, who was at the material time in charge of the materials at the KLB container storage yard. Mazlan bin Mansor demanded that the security guard allowed him to take out the prime mover on the basis that it required immediate repair. Mr K Ramesh Karnan stated that thirty security guards were posted at Lot PT 1262 Mukim Ampangan Tuanku Jaafar Industrial Park and only one guard was posted at the KLB container storage yard at the verbal request of Ms Wong Mook Lan from Samsung. Reeliance Security provided one guard at the KLB storage container yard as a favour to Samsung and was not paid any extra fee for the service rendered. The guard's duty was just to open and close the gate of the KLB yard since there were no directives, verbal or in writing from Samsung as to the proper safety procedures that he has to follow.

[27] In perusing the security services agreement, I find myself in agreement with the defendant's solicitor, Mr Mahendra Mahason that the said agreement covers only Samsung's premises with absolutely no mention of the KLB container storage yard. This can be seen in cl. 1 of the security services agreement which states:

> The Company shall provide the customer with the said services in respect of the entire premises known as Samsung Electronics Display (M) Sdn Bhd, Lot PT12692, Mukim Ampangan, Tengku Jaafar Industrial Park, 71450 Seremban, Negeri Sembilan Darul Khusus.

It must be noted that the same appears in the insurance policy between Samsung and Axa-Affin, D4, which referred only to Samsung's premises:

> Salinan/DUPLICATE Jadual/THE SCHEDULED DUTI Setem berbayar/stamp duty paid
>
> Polisi Kelas/CLASS OF POLICY ... Jaminan Kejujuran/FIDELITY GUARANTEE
>
> No. Polisi/POLISI NUMBER ... S2DACF0240160600
>
> Menggantikan No. Polisi/REPLACING POLICY NO ... S2CACF0213080521
>
> Agensi/AGENCY ... S205080
>
> Akaun/ACCOUNT ... S205080
>
> Pelanggan/CLIENT ... A05220
>
> Dikeluarkan pada/ISSUED ON ... 16/08/2006 dalam/IN AGENCY CHANNEL
>
> Tempoh insuran dari/PERIOD OF INSURANCE FROM 01/06/2006 hingga/TO 31/05/2007, Termasuk kedua-dua tarikh/BOTH DATES INCLUSIVE
>
> Nama Pihak Diinsurankan/ ... SAMSUNG ELECTRONICS DISPLAY (M) SUN BHD
>
> INSURED'S NAME.
> Alamat/ADDRESS ... HSD 69244, NO. PT 12692
> MUKIM AMPANGAN
> TUANKU JAAFAR INDUSTRIAL PARK,
> 71450 SEREMBAN, NEGERI SEMBILAN.
>
> Perniaagaan/Pekerjaan/BUSINESS/OCCUPN ... ASSEMBLY OF DESK TOP PC MONITOR

[28] It is a well-known principle in law that in interpreting an agreement, the various clauses in the agreement must be regarded and looked at as a whole and not singly or independently from one another in order to construe the true intention of the parties concerned. Further,

A the court must give an interpretation according to the grammatical and ordinary sense of the words used in the agreement as decided in the case of *Bandar Raya Developments Berhad v. Ang Yoke Lin Construction Sdn Bhd* [1993] 2 CLJ 53; [1993] 1 AMR 8.

B **[29]** Reverting to the case at hand, it is a salient point to note that based on the evidence of DW1, Mr K Ramesh Karnan, it was at the request of Samsung that one guard be posted at the entrance of the KLB container storage yard to keep an eye on the containers therein. However, there was no written directive given by Samsung to Reeliance Security with regards to the security protocols of the said KLB container C storage yard in accordance with cl. 10 of the said agreement. This evidence has not been challenged by Samsung.

Clause 10 of the agreement states as follows:

> D The company (Reeliance) and the customer (Samsung) shall review and advise each other security matters of the said services from time to time. The customer shall propose and the company shall enforce. All directives shall be made by the customer in writing. The company shall not be liable to compensate for any losses occasioned in matter of no written directives from the customer unless informed earlier and E is superseded with written directives within a reasonable time.

[30] Adopting the principle as stated in the case of *Bandar Raya Developments Berhad v. Ang Yoke Lin Construction Sdn Bhd* (*supra*), I am of the opinion that a mere conduct of Reeliance Security in fulfilling Samsung's verbal request to post a guard at the entrance of the KLB F container storage yard could not be considered as common intention to amend cl. 1 of the said agreement to include the "new premises" that is the KLB container storage yard at Senawang. Again in *Jagathesan v. Linggi Plantations Ltd* [1967] 1 LNS 61; [1969] 2 MLJ 253, His Lordship, Ong Hock Thye CJ states:

> G The cardinal rule of construction of the terms of a written agreement is to discover there from the intention of the parties to such agreement. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that consideration which its language will admit, which will best H effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. (See *Ford v. Beech* (1848) 11 QB 852.)

I **[31]** Based on the above reasons, I am of the opinion that the security services agreement and the insurance policy, D4, do not cover the KLB container storage yard at Senawang. Thus Reeliance Security is not liable for breach of contract to provide security services at the KLB container

storage yard. Even if the storage container yard is covered by the agreement, the issue of negligence on the part of Reeliance Security does not arise and is a non issue since Samsung cannot prove that it has given any written directives to Reeliance Security under cl. 10 of the said agreement pertaining to security matters such as the requirement of a gate pass or a container movement chit to be shown to the security guard on duty before any containers can be taken out of the KLB yard.

[32] Now I shall deal with the issue as to whether the plaintiffs have proven that there was a theft of 352 units of plasma display panel modules and whether the plaintiffs have discharged the burden of proving its case by calling all relevant witnesses and producing relevant evidence.

[33] In answering this issue, it is my finding that the plaintiffs have not produced the complete adjuster's report despite attempting to rely on the oral testimony of the said adjuster, Mr Tan Eng Hye, PW1. The plaintiffs have relied entirely on the findings of Mr Tan Eng Hye. However the full report, the method of investigation, as well as the steps taken in coming to PW1's findings was not made available before me. Further, Mr Tan Eng Hye had admitted under cross-examination that he did not interview the two employees of Samsung, Mr Mazlan bin Mansor and Mr Shaharudin bin Yahya who he alleged in his report had taken the said container out of the KLB container storage yard. It is unusual for the "suspects of the alleged theft" to not be interviewed by the adjuster, Mr Tan Eng Hye especially when Mr Tan Eng Hye had himself admitted that the two employees were still in the employment of Samsung at the material time. The plaintiffs did not give any explanation why the two employees were not questioned or interviewed. To make matters worse, Mr Tan Eng Hye had also admitted that there is no proof presented before this court to show that initially the container was actually laden with 704 units of plasma display panel modules.

[34] Further, PW2, Mr Teh Yau Kun, the vice president of Axa-Affin admitted that there is no evidence to prove the original contents of the container and the quantity of goods in the container. Mr Teh Yau Kun's basis of testifying in court is that the adjuster informed him of that fact. In other words, the plaintiffs failed to show any evidence that there was a theft of 352 units of plasma display panel modules and as such the claim by the plaintiffs for losses it suffered is not established.

[35] It also pertinent to note here that PW3, Miss Mareza Mohamad, testified and admitted that there is no evidence to show the actual contents of the said container before the alleged theft took place. Further, the plaintiffs' have failed to adduce evidence from two principle witnesses, that is Ms Wong Mook Lan, the security manager at the

material time as well as Mr K H Soh, the head of the Material Control Department to prove the actual contents of the said container. During cross-examination of Miss Mareza Mohamad, it was revealed by her that the actual department that can prove this fact would be the Material Control Department. However Mr K H Soh was not called and neither were any personnel, officers or representatives of this department were brought to court to testify as to the actual contents of the container. Thus there is actually no evidence presented before me that there was indeed a theft and if so, what actually was stolen from the said container.

[36] Based on the above reasons, I make a finding that the plaintiffs have failed to prove that Reeliance Security is negligent and therefore liable for breach of the agreement/contract and subsequently Reeliance Security is not liable to pay RM707,138.57 for the money paid by Axa-Affin to Samsung as insured money based on the insurance policy, D4. From the evidence, it is crystal clear that the plaintiffs have failed to satisfy its obligation to prove its case on the balance of probabilities. In this regard, I am guided by the case of *Tenaga Nasional Berhad v. Perwaja Steel Sdn Bhd* [1995] 4 CLJ 670; [1995] 4 MLJ 673, where the court held:

> Under s. 101(1) of the Evidence Act 1950, whoever desires the court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exists. In other words, the plaintiff must prove such facts as the plaintiff desires the court to give judgment as to its right to claim against the defendant or the defendant's liability to pay the plaintiff. The burden of proof is on the plaintiff: s. 101(2). In order to succeed here, the plaintiff must prove its claim affirmatively.

I also refer to the case of *CIMB Bank Bhd v. Ng Lee Lian & Anor and Another Case* [2011] 10 CLJ 116, where the court states as follows:

> In a civil trial, the plaintiff bears the burden of proving the particulars of his claim on a balance of probabilities. This is called the legal burden of establishing the case which lies on the plaintiff throughout the trial (s. 101(1), Evidence Act 1950) as distinguished from evidential burden which is the burden of introducing evidence. The latter would shift to the defendant only upon the plaintiff having discharged its onus of establishing its pleaded case, failing which the case would fail irrespective of whether the defendants have established their defence. The correct approach to be adopted was discussed in *Selvaduray v. Chinniah* [1939] 1 LNS 107 where Terell Ag CJ adopted the position explained by Brett MR in *Abrath v. North Eastern Railway Co* [1883] 1 QBD 442, at p. 452 and concluded:
>
> After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a *prima facie* case, but at the conclusion of the trial the

> learned judge has found that the position was exactly even, ie, that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of this case, the alternative version which he tried to prove in answer to that of the plaintiff. But as he was not the claimant, that consideration is quite immaterial. It is quite sufficient for his purpose it he can satisfy the court that the plaintiff has not established his case and the learned judge has so found.
>
> In short, the evidence has to be viewed as a whole at the conclusion of the case and a determination made whether there is preponderance in favour of the plaintiff.

[37] I also agree with Mr Mahendra Mahason's submission that this court should invoke an adverse inference under s. 114(g) of the Evidence Act 1950 (Act 56) for the plaintiffs failure to prove its case as discussed above in respect of its failure to produce the complete adjuster's report and to produce the material witnesses such as Ms Wong Mook Lan, Mr K H Soh or the investigating officer pertaining to the alleged theft of 352 units of plasma display panel modules that had occurred on 3 August 2006. Further, no witnesses from the Material Handling Department were ever brought in evidence to testify as to the actual goods that were stored or laden in the container at the material time when the alleged theft occurred. In this regard, the failure or refusal to adduce these witnesses and documents would raise an adverse inference against the plaintiffs under s. 114(g) Evidence Act 1950. This principle is laid down in by the case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 which the court stated as follows:

> It is essential to appreciate the scope of s. 114 (g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document but material document by a party in his possession or for non-production of not just any witness but an important and material witness to the case.

Conclusion

[38] In conclusion I find that:

(i) There is no breach of the security services agreement dated 9 May 2006 by Reeliance Security since the KLB storage container yard at Senawang where the alleged theft occurred is not covered by the said agreement. The insurance policy between Samsung and Axa-Affin, D4, also does not cover the KLB yard.

(ii) Even if the KLB storage container yard at Senawang is covered by the said agreement, I find that Reeliance Security is not negligent since there were no written directives issued by Samsung as required under cl. 10 of the said agreement to Reeliance Security to post a guard at the yard or any other written directives pertaining to security matters such as the requirement of a gate pass or a container movement chit to be shown to the security guard before any containers can be taken out of the KLB yard.

(iii) I also find that the plaintiffs were unable to prove that 352 units of plasma display panel modules were stolen from the KLB storage container yard since the plaintiffs could not prove that there were initially 704 units of plasma display panel modules in the said container before the alleged theft took place.

(iv) There is inadequate evidence before this court to allow the plaintiffs claim since the material witnesses and documents were not called or tendered. For the foregoing reasons, I am unable to conclude that the plaintiffs have proved its case, on a balance of probabilities. Accordingly I am left with no option but to dismiss the plaintiffs' claim with costs.

Costs

[39] Mr Mahendra Mahason prayed for RM20,000 as costs and Mr Ganesarajah Nadarajah prayed for RM10,000. On the factual background and circumstances of this case, I feel RM15,000 is adequate and fair.

[40] Plaintiff claim dismissed with costs RM15,000.